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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1258

JOSEPH ALFRED TANNER and
JACK ALTER PEARL,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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IN THE

Supreme Court of the United States

October Term, 1973

No.

JOSEPH ALFRED TANNER and
JACK ALTER PEARL,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Joseph Alfred Tanner and Jack Alter Pearl, jointly pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, described *infra.*

OPINIONS BELOW

The opinion ("Order") of the Court of Appeals, printed in Appendix A hereto, *infra,* is not reported. The Memorandum Opinion of the District Court, printed in Appendix B hereto, *infra,* is not reported. The latter opinions are on proceedings under a post-conviction motion. On the direct appeal from petitioners' convictions the opinion of the Court of Appeals is

reported as *United States* v. *Tanner*, 471 F. 2d 128 (7th Cir. 1972), *cert. denied*, 409 U.S. 949 (No. 72-224, Oct. Term, 1972).

JURISDICTION

The judgment ("Order") of the Court of Appeals was entered on October 15, 1973. The Court of Appeals by order denied a timely petition for rehearing on December 17, 1973. By order of Mr. Justice Rehnquist the time within which to file this petition for certiorari has been extended to February 15, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

After the trial and conviction of the petitioners on charges of violence to property in a case arising out of a labor dispute, Alvin Junior Cupp, the indispensable prosecution witness, acting without any solicitation from the defense, sought out defense representatives to make a total and very detailed recantation. Because Cupp's prior testimonial performances in this case had been chameleon-like and his credibility as the Government's witness had been accepted by the trial jury with knowledge of that chameleon history, the Courts below rejected his post-trial recantations *in toto* without allowing an evidentiary hearing, notwithstanding that several specific items in Cupp's recantation are entirely new (i.e. the trial jury had no opportunity to consider these items), are entirely believable, and would almost surely produce an acquittal in a new trial. The questions are:

1. Was it error to deny the motion for new trial on the ground of newly discovered evidence and/or for a writ

of error *coram nobis*, without conducting any evidentiary hearing, where the newly discovered evidence consisted of voluminous post-conviction recantations bv the indispensable prosecution witness recanting the entirety of his inculpative testimony against petitioners?

2. Was it error to deny the motion without an evidentiary hearing where the recantation included the new and believable item that the recanting witness had perjuriously told the trial jury that reputable defense trial attorneys suborned him in pretrial recantational tape recordings which he had made for the defense, and which the trial Judge had refused to let the defense play for the jury so that the jurors might assess the verisimilitudes of Cupp's voice and words on the tapes? Did this now-confessed slander which Cupp uttered under oath before the trial jury, defaming the integrity of the defense trial attorneys, deprive petitioners of a due process trial and of the effective assistance of trial counsel, and does this specific recantation item require an evidentiary hearing on the within post-conviction motion and the granting of a new trial?

3. Was it error to deny the motion since thereby petitioners were denied due process of law in that they stand convicted on constitutionally tainted testimony?

4. Was it error to deny the motion "in the interest of justice" (Rule 33, Federal Rules of Criminal Procedure; U.S. Const., Fifth and Sixth Amendments)?

5. This Court never yet having spoken on the merits as to the standards for deciding motions for new criminal

trial based on recantation of prosecution testimony*, and Rule 33 of the Federal Rules of Criminal Procedure having become reduced practically to a dead letter in nearly all recantation cases in recent decades as the lower Federal Courts tend to apply a virtual presumption of the indiscriminate worthlessness of recantation testimony, do the circumstances of this case merit a plenary consideration by this Court, for the first time, of the guidelines for administering Rule 33 in recantation cases so as to revive the fair and reasonable effectiveness of the Rule in the interest of justice?

6. Was it error to deny the *coram nobis* branch of the motion without an evidentiary hearing, since "coram nobis include[s] errors 'of the most fundamental character'" (*United States* v. *Morgan*, 346 U.S. 502 512 (1954)), and since, in *coram nobis*, "In behalf of the unfortunates, Federal Courts should act in doing justice if the record makes plain a right to relief" (*id.*, 346 U.S. at p. 505).

CONSTITUTIONAL PROVISIONS, STATUTE AND COURT RULE INVOLVED.

The case involves the Fifth Amendment (due process) and the Sixth Amendment (right of counsel) of the United States Constitution; Rule 33 of the Federal Rules of Criminal Procedure; and 28 U.S.C. § 1651.

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* *United States* v. *Johnson*, 327 U.S. 106 (1946), and *Mesarosh* v. *United States*, 352 U.S. 1 (1956), where the Court did discuss standards for new trial on the ground of newly discovered evidence of trial perjury, were not recantation cases.

Rule 33 reads:

"Rule 33. New Trial

The court on motion of a defendant may grant a new trial to him if required in the interest of justice. If trial was by the court without a jury the court on motion of a defendant for a new trial may vacate the judgment if entered, take additional testimony and direct the entry of a new judgment. A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict or finding of guilty or within such further time as the court may fix during the 7-day period. As amended Feb. 28, 1966, eff. July 1, 1966."

28 U.S.C. §1651 reads:

§1651. Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

As amended May 24, 1949, c. 139, §90, 63 Stat. 102."

STATEMENT OF THE CASE*

This petition seeks review of a judgment ("Order") of the United States Court of Appeals for the Seventh Circuit (Appendix A hereto, *infra),* entered October 15, 1973, rehearing denied December 17, 1973, which affirmed an order of the United States District Court for the Northern District of Illinois, Eastern Division, entered November 9, 1972 (Appendix B hereto, *infra),* denying, without an evidentiary hearing, a motion by petitioners Tanner and Pearl for a new trial on the ground of newly discovered evidence, and/or for a writ of error *coram nobis.*

The convictions which petitioners sought to set aside by their post-conviction motion were for Federal offenses involving violence to property during a maritime labor dispute on the Great Lakes in 1963. Petitioners were labor unionists. They were convicted in 1969.

The post-conviction motion here involved was brought in November 1972, shortly after completion of the direct appeal proceedings**, and promptly after denial of the motion by the District Court petitioners began serving their sentences (five years each). Bail pending these post-conviction proceedings has been denied by the Courts below. As this is written, petitioners are in their fifteenth month of imprisonment.

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* As previously noted, this now post-conviction case was before this Court on the direct appeal from the convictions in No. 72-224, Oct. Term, 1972, cert. denied, *Tanner* v. *United States,* 409 U.S. 949 (1972). Our petition for certiorari and our "Petitioners Reply To Memorandum In Opposition" in No. 72-224 cited all of the record materials relevant hereto which pre-date the within post-conviction proceedings. For convenience we shall refer in this petition to our latter papers in No. 72-224.

** The timeliness of the post-conviction motion has not been disputed by the Government or questioned by the Courts below.

These incarcerations have arisen out of an extraordinarily embittered labor dispute of more than a decade ago, and out of a likewise embittered litigational history in which the most conspicuous circumstance has been the Government's relations with the witness Alvin Junior Cupp.

The Great Lakes maritime labor dispute of 1963 had dynastic ramifications, on an international scale (see the Seventh Circuit "Joint Appendix" in No. 72-224, U.S.S. ct., Oct. Term, 1972, at pp. 54a - 59a). Petitioner Tanner, then a vice president of the Seafarers' International Union, with petitioner Pearl as his chief lieutenant, was prominent in conducting the front-line strike activities. Cupp testified at petitioners' trial that, at the direction of Tanner and Pearl, he committed acts of violence against railroad and shipping property. But Cupp has also testified to the contrary.

In order to appreciate Cupp's strange role in this case, his evolution as a "witness" for the prosecution needs to be considered:–

In 1964-1965, after the 1963 strike, Cupp and petitioner Pearl were prosecuted in Marquette, Michigan, for similar Federal crimes for violence to property during that strike; Cupp pleaded guilty to one count of conspiracy in the Marquette case and the charges as to Pearl were dismissed (Pet. Cert., No. 72-224, p. 8).

In March 1965 Cupp began a five year sentence in the Marquette case, and from then until April of 1966, when Cupp gave Federal grand jury testimony against petitioners Tanner and Pearl, Cupp was *undisputedly* subjected to various coercive and inducing ministrations by the Government to break down his unwillingness to testify; the details of this undisputed wrongful conduct by the Government, to obtain Cupp's 1966

Grand Jury testimony against petitioners, are catalogued, with record references, in Pet. Cert., No. 72-224, pp. 8-9; see also *id.*, p. 9-10 as to the Government's improper relations with Cupp for more than a year after his Grand Jury testimony of April 1966, Cupp having been released from prison in December 1966.

The indictment against petitioners in the present case was filed in January 1967.

In the late Spring of 1967 Cupp, who was now free and enjoying a most bounteous relationship indeed with the Government, secretly sought out defense representatives in the Tanner-Pearl case to give them proofs that the Government had coerced, induced and suborned him in his Grand Jury testimony against petitioners; Cupp at that time voluntarily and freely gave to the Tanner-Pearl defense secret tape recordings spelling out the Government's misdoings in voluminous detail and, throughout, in Cupp's own spontaneous language (Pet. Cert. No. 72-224, pp. 10-11)

On July 17, 1967 Cupp, Pearl and a defense attorney (William S. Evans, Esq.) were to meet secretly in Chicago to have the Cupp tapes notarized. The F.B.I. intercepted Cupp and Pearl before they could rendezvous with the attorney. Pearl, a 350-pound diabetic, was arrest on a phoney "draft card" charge and his brief case containing the secret tapes and a large amount of other secret defense legal papers was seized; this arrest and seizure were later ruled illegal by the District Court. When the F.B.I. and the United States Attorney's Office found out that day (July 17, 1967) that Cupp had made the tape recordings, they violently reviled and threatened Cupp and at once clapped him back into jail on the charge of carrying a gun which the F.B.I. had known for months that Cupp was carrying and which they had permitted him to carry. Pet. Cert., No.72-224, pp. 11-13.

We pause to note that in the 1969 Tanner-Pearl trial herein, Cupp, testifying for the prosecution, swore in detail that he had completely "made up" prior sworn statements of having been atrociously intimidated by the Government on July 17, 1967 (Pet. Cert. No. 72-224, pp. 28-29). Now, in the recantation here involved, in a question and answer colloquy with our defense investigator to whom he gave this recantation, Cupp states that he lied on this subject in the 1967 trial (see Motion for New Trial, etc. in the District Court in the within post-conviction proceedings, pp. M-54 to M-55):

> "*Question 1.* You will no doubt vividly recall that you and Jack Pearl were arrested by the FBI in Chicago on the afternoon or evening of July 16, 1967.
>
> "And sometime afterward, when you were telling Jack Pearl and me about what had happended to you that night, you told us that while Messrs. Perkins, Meyers, Morrissey, Hanrahan and others were listening to the tapes that you had made for Jack Pearl and myself, one of these men cursed you and said: "If these were the old days, I would throw you to hell out of the window," and then you eventually saw that while you and these men were listening to the tapes, one of these men had drawn a picture of a rat, with a big knife stuck in its back.
>
> "However, when you testified at the trial of Al Tanner and Jack Pearl in the spring of 1969, you testified that you had made up the story about someone cursing you and saying, "If these were the old days, I would throw you to hell out of the window," and you also testified that you had made up the story about someone drawing a picture of a rat with a big knife stuck in its back.
>
> "Now here is the question Mr. Glasser wants me to ask you. Mr. Glasser wants to know which is the truth—what you told Jack Pearl and myself about the above described incidents, or what you testified to at the Tanner-Pearl trial about these same incidents?
>
> "Al Cupp answered:

> "What I told you and Jack Pearl was the absolute truth. It was Mr. Hanrahan who said "If these were the old days, I would throw you to hell out of the window," and it was Mr. Morrissey who drew the picture of the rat with a big knife stuck in its back. Nick Etten rehearsed me very well before I testified at the Tanner-Pearl trial and Nick told me what to forget and what to remember. Among other things, Nick Etten told me to forget this remark of Mr. Hanrahan's about throwing me to hell out of the window and Nick also told me to forget about Mr. Morrissey drawing the picture of the rat with the big knife stuck in its back. I was under tremendous pressure when I testified at the Tanner-Pearl trial, so I followed Nick Etten's instructions when I testified at that trial."

The above-quoted specific item in Cupp's present recantation is another instance of the category previously mentioned, i.e., specific and entirely believable items in the recantation which cannot be indiscriminately rejected without an evidentiary hearing as supposedly being merely part of a generalized recantation presumptively worthless *in toto*. This item, relating to what did really happen when the Government caught Cupp on July 17, 1967 and angrily threw him back into jail because he had made the secret tape recordings, goes not only to the question of the perjuriousness of Cupp's overall 1969 trial testimony and of the Government's knowing use of the perjury and concealment of the truth, but it is also a confirmation of our contention throughout this case that the Government's unconstitutional conduct on July 17, 1967 was focal in enabling the Government ultimately to coerce Cupp into testifying against the present petitioners in 1969, that is, the 1969 Cupp testimony was "fruit of the poisonous tree" (Pet. Cert., No. 72–224, pp. 11-26, 37-43).

Let us now resume the thread of Cupp's evolution as a prosecution witness in this case; we had above reached the point, on July 17, 1967, when the Government terrorized Cupp

and reincarcerated him for having made the secret and illegally seized tape recordings:–

For several months after thus being re-jailed on July 17, 1967, Cupp was subjected by the Government to psychological and physical attritions at the jail. On December 18, 1967, Cupp told the District Judge in open court that an Assistant United States Attorney–who was present and did not deny Cupp's statements–"told me that he was going*** to give orders to*** let them finish me off there", referring to Cupp's just having been beaten up (broken hand) by inmates in the Cook County Jail. (Pet. Cert., 72-224, pp. 13-17).

Now too, in December 1967, Cupp made it known to the District Judge that he would not testify for the Government and that he desired to cooperate with the defense side. Cupp consulted with the defense attorneys throughout December 1967 and January and February 1968 (all this time Cupp was continuing in jail under the phoney gun charge) (Pet. Cert., 72-224, pp. 13-17).

During this time (winter of 1967-1968) Cupp made additional voluminous tape recordings, for defense attorney Evans (Pet. Cert., 72-224, pp. 14, 33-35). It was Cupp's perjurious repudiation of these Evans tapes, in the 1969 Tanner-Pearl trial, as having been suborned and faked by Mr. Evans, which won for the Government that result, previously mentioned, of convincing the 1969 trial jury that the entire defense team, including reputable defense attorneys, were suborners and bribers (Pet. Cert., 72-224, pp. 33-36, 43-46).* In his present recantation Cupp specifically sets the record straight, at last, on this subject of attorney Evans' conduct in connection with the tape recordings (Motion for New Trial,

* Of the many defense attorneys who have been in this case, undersigned counsel Messrs. Glasser and Hanson are among the small handful whom Cupp has never accused of impropriety.

etc., in the District Court, in the within post-conviction proceedings, pp. M-55 to M-56):

> *"Question 2.* When you testified at the Tanner-Pearl trial in the spring of 1969 you testified that the tapes you dictated for your attorney Bill Evans at the Du Page County Jail at Wheaton contained a lot of false or fake material, fed to you by Bill Evans. Was that testimony true?
>
> "Al Cupp answered:
>
> "No, that testimony was not true. Bill Evans did not feed me any false or fake material. Whatever I put on the tapes was my own material; it did not come from Bill Evans and it was not false or fake. Bill Evans told me to shorten the story and only put the high points and most important facts on the tape. He did not tell me what to say."

The above quoted item in Cupp's present recantation is the chief one of the specific recantation items which we say are entirely believable and would be almost sure to produce an acquittal in a new trial. Furthermore, as previously noted, this particular recantation item is entirely "new" in its impingement on the issues of new trial herein, because the 1969 trial jury had before it, on this vital issue of the alleged probative corruptness of the whole defense case, only Cupp's charges that we had faked the tapes. Until Cupp's present recantation, there was no such statement from Cupp as is now available, that he deliberately lied in accusing Mr. Evans of subornation. This dreadful accusation against Mr. Evans (who was petitioner Tanner's attorney in the 1969 trial) struck down the defense like a bombshell. It was the first time Cupp had ever thus accused the defense of suborning him. Therefore, again, we emphasize that the 1969 trial jury had no opportunity to judge of the subject matter of Cupp's present recantation on this

specific item which was so vital to both sides in the 1969 trial. See our Question Presented no. 2 herein, *supra.*

We had above reached the point, in February 1968, where Cupp was cooperating with the defense notwithstanding the Government's pressures upon him after his reincarceration for having given us the secret tape recordings. As the Government's case against petitioners was thus languishing because of Cupp's unavailability as a prosecution witness on into the early months of 1968, suddenly, on March 11, 1968, the District Judge ordered Cupp severed from the other defendents and that he be tried separately on April 1, 1968.* Cupp was thereupon put to his separate trial, isolated from his co-defendants, and, was struck with a new ten year sentence (Pet. Cert., 72-224, pp. 17-19).

During the rest of the year 1968 Cupp, even though now crushed down by his new ten year sentence, persisted in his stand on the defense side, refusing to testify against petitioners. Suddenly, late in January 1969 it was learned that Cupp had been secretly won back over by the Government, and suddenly now also there was a rush to try petitioners before Cupp might once more wriggle back out of the Government's grasp (Pet. Cert., No. 72-224, p. 19). Petitioners were then tried, during the Spring of 1969, and were convicted on Cupp's testimony, some of whose remarkable features were described in Pet. Cert., No. 72-224, pp. 27-46.

The above carries the chronology of Cupp's evolution as a prosecution witness in this case to the consummating point of petitioners' 1969 trial. Prior to Cupp's present recantation, it had remained a mystery to the defense as to just what had

* Cupp had been named as a co-defendant in the January 1967 indictment against petitioners.

triggered Cupp's switch-over back to the Government's side early in the year 1969. In his present recantation, Cupp has at last shed light on this mystery, for, in another of those specific items in this recantation which are entirely new and entirely believable, Cupp has now revealed that another physical beating, at the prison early in 1969, again by jail inmates, was the last straw in terrorizing Cupp into testifying for the Government against petitioners, Cupp now stating in his recantation that "after this beating he realized more strongly than ever that if he (Cupp) was to live, he had to have the goodwill and protection of the Government, so he switched over from the truth, to the story the Government wanted him to tell, and agreed to give false testimony to get Tanner and Pearl convicted" (Motion for New Trial, etc., in the District Court, in the within post-conviction proceeding, pp. M-64 to M-65). Both of the Courts below, in this post-conviction proceeding, have apparently lumped this specific recantation item, along with the specific items *(supra)* as to Cupp's terroristic reincarceration in July 1967 and as to defense attorney Evans' alleged subornation of Cupp, into their indiscriminate total rejection of the recantation as being worthless *in toto* and as not even meriting an evidentiary hearing either as to the recantation as a whole or as to any of its specific portions, believable though some of the latter plainly are.

We will now summarize the proceedings below on the within post-conviction motion:–

Petitioners were sentenced in this case in July 1969. Shortly thereafter Cupp's sentence was reduced and he was freed. In June 1971, during the direct appeal proceedings from petitioners' convictions, Cupp telephoned defense investigator John G. Broady; this was the first anyone of the defense side had heard of or from Cupp since the 1969 trial. This telephone

call from Cupp to Broady was a complete surprise. In that first telephone call and in several subsequent others during July and August 1971 Cupp told Broady, in essence, that Cupp had lied at the Tanner-Pearl trial herein, that named Government officials had induced and forced him to lie, and that he now desired to establish the innocence of Tanner and Pearl. During August 1971 Cupp also telephoned, and consulted in person, with John Butler, Esq., of Cleveland, Ohio, a former attorney of Cupp and also of Pearl, along the same recantational lines. On the eve of the oral argument of the direct appeal in the Court of Appeals, October 18, 1971, Cupp again telephoned Broady, renewing his offers of recantation, and stating that the Government knew nothing of his thus renewed (mid-appeal) contacts with the defense. In the course of Cupp's June-October 1971 telephone conversations with Broady, petitioners' within counsel, Abraham Glasser, repeatedly instructed Broady not to accept from Cupp any information whatever as to Cupp's address, telephone number, employment, or any other information which would result in giving us any knowledge of Cupp's whereabouts or of how to locate him, lest we be hampered in applying to the courts, at the proper time, for interim protection for Cupp himself or for ourselves, as against any harassment or reprisal efforts of the Government—this case having been characterized from its outset, as it has appeared to us, by an odd spirit of vindictiveness by the prosecution side towards the defense side, including defense attorneys, and by governmental highhandedness towards Cupp. (To this moment we do not know where Cupp is or how to locate him, nor do we want any such knowledge, except and until appropriate protective judicial process is lodged.) Subsequent to the oral argument of the direct appeal in the court below (October 20, 1971) Cupp made additional recantational statements to Broady, plus a lengthy similar recantational statement on the telephone to Pearl.

We shall summarize the details of Cupp's recantational statements (Motion for New Trial etc., in the District Court, in the within post-conviction proceedings, pp. M-48 to M-76, M-103 to M-121): – In his initial call to our investigator Broady, June 27, 1971, Cupp said "He hoped we all realized that he had only done what he did because he was under the hammer, that he had not really wanted to hurt anyone but he was given no choice and was forced to do what he did to save his own skin. * * * However, Al said that certain things had happened which, if we knew about them, should be enough to upset the conviction". (*Id.*, p. M-48). In the second telephone call to Broady, June 30, 1971, Broady had two witnesses on extension phones, his daughter Susan and petitioner Pearl, and in response to a question from Broady Cupp said "He did not tell the truth, the whole truth and nothing but the truth at the Pearl-Tanner trial in Chicago" (*Id.*, p. M-50). In that same conversation "Cupp said he is not a lawyer but if Broady will meet with him, he will tell Broady of things that happened before, during and after the trial in Chicago that he believes will be good grounds for getting Tanner and Pearl a new trial. * * * Cupp said he would not tell Broady over the telephone what Government officials knew at the time that he was not telling the truth, the whole truth and nothing but the truth, when he testified in Chicago, because he Cupp lives in Chicago and is out at nights in that city" (*Id.*, pp. M-50 to M-51). In the third telephone call, July 7, 1971, Cupp said "he would no doubt be spending a lot of time with Abe Glasser later, going over the record and pointing out to Abe Glasser the mess of lies that Al Cupp had testified to at the trial and telling Abe Glasser what they had done to get Al Cupp to tell these lies" (*Id.*, p. M–52). In the fourth telephone call, July 16, 1971, Broady told Cupp that defense attorney Abraham Glasser "wanted Broady to ask Al Cupp two test questions so that Mr. Glasser would know where the whole thing was leading." (*Id.*, p. M-59). [We have

quoted at pp. 9, 12, *supra*, these two test questions and Cupp's answers, relating to the Cupp-Evans tapes and the scene at Cupp's capture on July 16, 1967. In that same telephone conversation of July 16, 1971, Cupp also said (*id.*, p. M-57): "* * * I was told to lie and I did lie when I testified at the Tanner-Pearl trial and the Government knew I was lying. What I told you [Broady] and Jack Pearl on the tapes that I dictated for you was, and still is the truth, * * *. And I would like to change my testimony at the Tanner-Pearl trial to conform to what is on those tapes that I dictated for you and Jack Pearl. However, when Judge Marovitz reduced my sentence he said he did not want to ever hear of me contacting the people I used to work with, and that is another reason why I delayed calling you so long, though I often thought of it and wanted to call you long before I did call you." And further (*Id.*, p. M-58): "* * * Even if it puts me back in prison, I still want to tell the truth and see the conviction of Al Tanner and Jack Pearl set aside, because they were convicted on my false testimony given by me after tremendous pressure and duress was brought to bear on me". In the fifth telephone conversation, July 22, 1971, Cupp generally reiterated the foregoing, added that "he had told so many lies at the trial that he was afraid he could not remember all of them" (*Id.*, p. M-62), and he named two Assistant United States Attorneys who "had told him what to say and had told him what to testify to things that were not true" (*Id.*, p. M-63). In the sixth telephone call, July 27, 1971, audited by Broady's daughter Susan, Cupp said he wanted to speak to a "responsible official of Seafarer's Union * * * to get assurance that if he Cupp told the truth (which he said was the story he Cupp told at the suppression hearing, and at his own trial) that Seafarer's would do their best to protect him" (*Id.*, p. M-64). Cupp also related the above mentioned (p. 14, *supra*) entirely new (to us) incident of a physical beating by jail inmates early in 1969, just before he switched over to the Government side

(*Id.*, pp. M-64 to M-65). In the seventh telephone conversation, July 31, 1971, Cupp in substance repeated the above noted items of the sixth conversation (*Id.*, pp. M-67 to M-72). The eighth telephone conversation, August 11, 1971, was also similar (*Id.*, pp. M-74 and M-75). The ninth telephone conversation, August 21, 1971, introduced the important new item that Cupp had met with a former defense attorney, John Butler, in Cleveland, "and had told Butler that he Cupp had been forced to lie a great deal when he testified at the Tanner-Pearl trial in Chicago" (*Id.*, p. M-76). * The tenth telephone conversation, October 18, 1971, two days before the oral argument in the direct appeal herein, was in substance another reiteration of the recantations, plus various secondary details (*Id.*, pp. M–41 and M-43). The eleventh telephone conversation, night of October 23–24, 1971, audited by Broady's daughter Susan, contained expressions of fear by Cupp in the aftermath of the oral argument of October 20, 1971 in the court below, in which Cupp's recantational contacts with us had been made known (*Id.*, pp. M–103 to M–105). Next, on November 5, 1971, Cupp telephoned Broady two or three times and said that "if he could not work out any understanding with the SIU crowd (Seafarer's Union), he was thinking of going to the FBI and telling them that the reason he had contacted Broady and others and again offered to testify in favor of Tanner and Pearl was because he Cupp was once promised $10,000 but had never gotten it and he had hoped to collect the $10,000 in this manner" (*Id.*, p. M–109). Next, on December 5, 1971 Cupp telephoned defendant Pearl saying, "Do not worry, I am on your side, I am going to tell the truth. * * * You know I was forced to testify the

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* See also *Id.*, pp. M–35 to M-41 for more details *re* Cupp's dealings with Mr. Butler, in which Cupp (as reported by Mr. Butler to Mr. Glasser) asked for money from the maritime unions or from the defendants as the price of obtaining Cupp's newly proffered assistance.

way I did" (*Id.*, pp. M–113 to M–117, at M–116). That same night, December 5, 1971, Cupp also telephoned Broady again, adding nothing of significance (*Id.*, pp. M–118 to M–119). There was then a hiatus until April 1, 1972, when Cupp again telephoned Broady reiterating that "he was most anxious to meet with some responsible person connected with the defense of Tanner and Pearl so Al Cupp could arrange to give further testimony which he was sure would get the conviction of Tanner and Pearl set aside. * * * Cupp said that the SIU should begin working with him right away because he (Cupp) was making his living by hustling and if he should be killed, it would be too late to get the testimony he was prepared to give which would exonerate Tanner and Pearl" (*Id.*, p. M–120).

The foregoing recantation facts were presented by motion in the District Court in November 1972, after completion of the direct appeal proceedings. The Government's response urged that Cupp was now lying, and had told the truth at the Tanner-Pearl trial; and delivered an attack on the character of investigator Broady ("here the information was certainly obtained under suspicious circumstances by a person of questionable character") (letter of November 8, 1972 to Judge Marovitz from United States Attorney James R. Thompson by D. Arthur Connelly, Chief Criminal Division). * On November 9, 1972, District Judge Marovitz, declining to hold an evidentiary hearing, ** read from the Bench a memorandum

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* The Government adduced no facts for its attack on Broady's character except that he was a disbarred lawyer. See the Joint Brief (in the Court below) for Appellants Tanner and Pearl in the direct appeal herein (No's 17917, 17918), footnote at pages 117-118, where we marshalled the impressive facts in favor of Broady's character – his disbarment having been for the *malum prohibitum* offense of wiretapping.

** Except for Cupp himself, whom we wanted the Court to invite or subpoena, our witnesses for an evidentiary hearing were all available (Broady, attorney Butler, Pearl, attorney Glasser).

opinion denying our motion for new trial etc. (Appendix B hereto *infra*). Judge Marovitz stated he was satisfied that Cupp told the truth at the Tanner-Pearl trial and that "any contrary statements he has made following the trial would be unworthy of belief by this Court". The Court also cited and quoted from *People* v. *Shilitano*, 112 N.E. 773, referring unfavorably to recantations by witnesses "of a low and degraded character * * * sometimes influenced by bribery and other improper consideration".

The Court of Appeals, in affirming the denial of the motion without an evidentiary hearing (Appendix A hereto, *infra*), noted that in the direct appeal it had declined to upset the jury's acceptance of Cupp's 1969 trial testimony against petitioners, or the jury's apparent rejection of the attacks on Cupp's credibility based on his prior contrary statements; quoted approvingly the District Court's reasoning in denying the motion; and concluded as follows:

> "We agree with the trial court. We have read the statements of what Cupp purportedly told Broady. Throughout the conversations, Cupp was primarily concerned with "selling" his latest story for $10,000. He confessed to being a "hustler" and this was obviously a somewhat desperate hustle for quick money.
>
> "In *Larrison* v. *United States*, 24 F. 2d 82, 88 (7th Cir. 1928), we quoted another court in observing that "the witnesses to crimes of violence are often of a low and degraded character and . . . after they have given their testimony they are sometimes influenced by bribery and other improper considerations . . ."
>
> "There must be an end to the Cupp story. It has been written by the jury, this court on the direct appeal and finally by the trial court on the current motion."

REASONS FOR GRANTING THE WRIT

1. In essence, both of the Courts below rejected our motion for a new trial without an evidentiary hearing because they are unalterably convinced that Cupp told the truth at our 1969 trial and that any contradictory statements Cupp would make after that trial are unworthy of belief. This is too simple to satisfy the needs of justice, and of constitutional due process, in this case. With Cupp's concededly phenomenal history of self-admitted disregard for the truth and talent for spinning prodigious and elaborate lies on the spur of the moment (Pet. Cert., No. 72-224, *passim*), it would have been understandable if the Courts below had taken the position that no one can ever be sure when Cupp is telling the truth. That position, which the Courts below have not declared, is very different indeed from the position that one is unalterably sure that Cupp did tell the truth on one particular occasion but not on other occasions. It is likewise too simple to declare unequivocally, as the Courts below have here in effect done, that Cupp's entire 1969 trial testimony was the truth. There was much in that trial, in Cupp's testimony, which could well be (and which we are sure is) untrue, and the correction of some of those untruths by Cupp at a new trial would almost surely lead to an acquittal of the petitioners. For example, we are respectfully convinced that if Cupp carries out his recent recantational proffers about Government coercion, new pretrial motions or a new trial would almost surely lead to a new result in this case in favor of the petitioners. Similarly, if Cupp upon a retrial testifies as he recently promised that the defense did not fake any of his pre-1969 trial recantational tapes, a new result in favor of the petitioners would be practically a foregone conclusion; or, at the very least, the previous judgments of conviction would have to be set aside because of the egregious constitutional injustice of having let the 1969 jury hear Cupp's indicatedly false charges

of tape-faking without also having let that jury listen to the tapes.

2. In addition there is the fundamental consideration that, in the interests of justice, the petitioners are entitled to an opportunity to have a new jury hear about Cupp's recent recantations. This is far from being the ordinary recantation case. This case is all but dizzying in its history of Cupp's gyrational testimonial antics. In earlier stages of this case we have unavailingly argued that a federal criminal case cannot constitutionally be tried at all on the prosecution testimony of such a grotesque "witness" as Alvin Junior Cupp, and that it should have behooved the Government itself to disavow Cupp, or to invite a judicial ruling on the question of his suitability as a prosecution witness, as was done in *Mesarosh* v. *United States*, 352 U.S. 1 (1956). But if that was not to be, are we not now at least entitled to have a new jury consider the *"Mesarosh"* issue as it were, in view of Cupp's recent recantation and his whole testimonial background in this case?

3. For our Court of Appeals brief in this post-conviction proceeding we researched the decisional statistics of the granting or the denial of an evidentiary hearing under Rule 33 in reported recantation cases. We found that in the overwhelming majority of such recantation cases in the Federal Courts–about seventy-five percent of these cases–a full evidentiary hearing is held on the motion for new trial. See, in the Court below, docket no. 72–1950, Joint Brief for Appellants Tanner and Pearl, pp. 19-22, 26-27. The Government and the Court below apparently accepted this interesting statistical finding, as they did not dispute the results of our research. We think it is very important for petitioners in this case that these judicial statistics as to the holding of evidentiary hearings in recantation cases be brought to light, lest

otherwise petitioners might suffer from the opposite statistical misimpression which we all know is prevalent among the federal Bench and Bar, that is, the conclusory misimpression that recantations in federal criminal cases do not need to be taken very seriously and do not even need an evidentiary hearing except in some extraordinary case. To the contrary, it appears that far more extraordinary is the federal recantation case in which an evidentiary hearing is not held.

It is true that in most of these cases in which such evidentiary hearings are held, the motion for new trial is denied after hearing. However, in the present case, with its extraordinary probative history, making it very difficult indeed to know where the real "truth" of Alvin Junior Cupp really reposes, it seems not only "statistically" very questionable but constitutionally very disturbing to bury our within post-conviction motion without even an evidentiary hearing.

This has been a protracted, complicated and unusually vexed federal criminal prosecution, nearly all of whose vexations and complications have been generated by the controversial testimonial role of Cupp. As the Court below itself said in *United States* v. *Curran*, 465 F 2d 260, 262 (7th Cir. 1972), where the District Court in denying a recantation-based motion for new trial had remarked "that there had been a long road in this case", the Seventh Circuit, we repeat, said "we do not deem, however, that the length of the road is *per se* a basis for finding that the terminal has been reached. As Judge Grant in speaking for this court stated in an analogous situation, '[The proceedings there involved] however desirable from the point of view of efficient and expeditious criminal adjudication, may not be had at the expense of a defendant's right to a fundamentally fair trial.' *United States* vs. *Echeles*, 352 F 2d 892, 896 (7th Cir. 1965)." This case should be remanded with directions to hold a full evidentiary hearing on our motion.

4. It is familiar in the federal courts that a recantation-based motion for new trial is to be tested by the rule first enunciated in *Larrison* v. *United States*, 24 F 2d 82 (C.C.A. 7, 1928)—that is, the test which applies is whether the recantation proofs "might" (rather than "probably would") produce a different jury conclusion. Accord: *United States* v. *DeSapio*, 435 F 2d 272, 286 (2nd Cir. 1970).

Can there be any doubt that the Cupp recantation proofs in the present case "might" produce a different jury conclusion?

Two items in the *"Larrison"* rule have given rise to doctrinal controversy. (1) Some courts have emphasized the *Larrison* language about perjured or recantational testimony which is "cumulative only", and have added the further restrictive test of "merely impeaching". The Court in *Larrison* said only, on these points, that "the fact that the testimony is cumulative only, should no doubt be considered, but it is not conclusive on the motion for a new trial" (24 F 2d at 87). (2) Some courts also have dwelt restrictively on the *Larrison* language "that the party seeking the new trial was taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial" (24 F 2d at 88).

As to the first of the above *Larrison* items—cumulative or impeaching recantations—the supposed doctrinal difficulty has been satisfactory addressed by several noted judicial scholars. In *United States* v. *On Lee*, 201 F 2d 722 (2nd Cir., 1953), cert. denied 345 U. S. 906, Judge Jerome Frank, dissenting, wrote one of his characteristically trenchant judicial essays demonstrating that the "merely impeaching" doctrinal concept simply has no place in the face of a plenary recantation. In *United States* v.

Rutkin, 208 F 2d 647 (3rd Cir., 1953), Judge Kalodner, dissenting, wrote similarly concerning the cognate doctrinal concept of "merely cumulative", in cases of plenary recantation. Cf. also Judge Frank, dissenting, in *United States* v. *Troche*, 213 F 2d 401 (2nd Cir., 1964). To the same effect, Judge Seabury, for the Court, in *People* v. *Shilitano*, 218 N.Y. 161, 112 N. E. 733, 736.

As to the second of the above doctrinal reductive attempts in regard to the *Larrison* rule–the question of a party's "surprise"–the conclusive answer and reasoning were given by Judge McAllister in *Gordon* v. *United States*, 178 F 2d 896, 900 (C.A. 6, 1949), cert. denied 339 U. S. 935, where he stated, for the Court, that "*** certainly, if all of the testimony given against a convicted man were recanted, it would not appear necessary to show that the party seeking a new trial was taken by surprise and was unable to meet such testimony or did not know of its falsity until after the trial".

5. We note the federal decisions in which new trials have been granted on recantation proofs. In *United States* v. *Flynn*, 130 F Supp 412, (S.D.N.Y. 1955), Judge Dimock granted a new trial on proofs of recantation by one Harvey Matusow, a character strongly reminiscent of our Mr. Cupp–with "class struggle" ideological overtones not applicable to Cupp. In *United States* v. *Miller*, 61 F Supp 919 (S.D.N.Y. 1945), Judge Moscowitz granted a recantation-based new trial involving a similar recanting witness concerning whom the Judge remarked "It is difficult to determine where the truth lies" (61 F Supp at 924). In *Pettine* v. *Territory of New Mexico*, 201 Fed. 489 (8th Cir., 1912), a new trial was granted on similar recanting testimony by a witness of indicatedly weak credibility. In *Ledet* v. *United States*, 297 F 2d 737 (5th Cir., 1962), and in *United States* v. *Mitchell*, 29 F.R.D. 157 (D.N.J. 1962), and in, *Newson*

v. *United States*, 311 F 2d 74 (5th Cir., 1962), and in *United States* v. *Stewart*, 445 F 2d 897 (8th Cir., 1971), on record facts incomparably less "dramatic" than the facts in our present case, new trials on the basis of recantation proofs were granted. (See also *Lindsey* v. *United States*, 368 F 2d 633 (9th Cir., 1966), cert. denied 386 U. S. 1025, where a case was presented superficially similar to ours, i.e., an elderly lady nearly 80 years old had given repeatedly self-contradictory recantations and re-recantations out of kindheartedness to the defendant, and the Court approved the denial of a new trial, but the Court remarked that "an unrepudiated recantation of trial testimony is not merely impeaching, but is substantial and material evidence (especially when made by a complaining witness), because the new version will presumably be testified to at the new trial", citing 8 Moore's Federal Practice, Second Edition, §33-5, 33-16 (368 F 2d at 636).

6. Rule 33 of the Federal Rules of Criminal Procedure speaks of a defendant's right to a new trial, on the ground of newly discovered evidence "in the interests of justice". Self-evidently, this language of Rule 33 incorporates the due process protections of the Constitution.

In our case neither the Solicitor General of the United States nor the United States Attorney for the Northern District of Illinois have thus far deemed it appropriate to reevaluate the constitutional justness of this prosecution as regards the indications of unconstitutional taint as was comparably done by the Solicitor General in *Mesarosh* v. *United States*, 352 U.S. 1. We now ask this Court to lend its judicial spur to an awakening of such a conscientious constitutional sentiment on the part of the federal prosecutive authorities in this case.

Needless to say we are not calling upon this Court to issue to the Solicitor General or to the United States Attorney any sort of directive or other "advisory" looking to such a change of constitutional conscience among the prosecution people in this case.

What we are respectfully suggesting is that, in the overall atmosphere of this case, as now climaxed by Cupp's recent recantations, there is presented a proper and necessitous occasion for judicial corrective in the framework of *Mesarosh, supra.* And we suppose it is our hope that when our brethren in the Solicitor General's office consider the within papers, they may conclude that some appropriate form of concession of error or other prosecutive concession for the relief of our clients is appropriate in this extraordinary case which rests so totally on the words of the "witness" Alvin Junior Cupp.

7. While the judicial "statistics", as seen, overwhelmingly favor the holding of an evidentiary hearing in a Rule 33 recantation case, the widespread impression is to the opposite effect, as we above noted. And indeed, as suggested in our Question Presented no. 5, *supra,* such evidentiary hearings tend to be conducted with a predilection of perfunctoriness which weakens the constitutional effectiveness of Rule 33, and which in some Circuits, more and more in recent years, works to diminish even the right to an evidentiary hearing in a recantation case.

A striking instance of this occurred in the Second Circuit on February 7, 1974, *United States ex rel. Robert Rice* v. *Vincent,* Docket nos. 73-2195, 73-2196, where (in a case coming up through state habeas corpus) the Court rejected recantation proofs, which the District Court had held to require a new trial on the basis of the motion papers alone and without

holding a District Court evidentiary hearing. The Second Circuit opinion in *Rice* does not so indicate, but we are advised by Rice's appeal counsel, Lewis M. Steel, Esq., that the recantation proofs are voluminous and highly specific. Thus, in *Rice*, a federal Court of Appeals has taken it upon itself, without record support in an evidentiary hearing, to reverse a District Court grant of a recantation-based motion that the District Court deemed sufficient on its face. The *Rice* case did not arise under Federal Rule 33, but the Court of Appeals reasoned the case on the basis of the Rule 33 authorities. Thus, the *Rice* case just about turns Rule 33 upside-down, because what we have now, under the *Rice* case, is not only the doctrine that Rule 33 does not mean very much at the District Court level in recantation cases, but that even when a District Court finds a Rule 33 recantation-based motion conclusively meritorious *on its face*, the Appeal Court may reverse without the benefit of any record material contributed *via* an evidentiary hearing.

The Court may wonder why we devote so much emphasis to this *Rice* decision of a few days ago. The reason is that we are advised by counsel for *Rice* that the case, which is one of the "Harlem Six" cases, will probably be brought to this Court on petition for certiorari. If that occurs, we would suppose that our within petition for certiorari would be considered together with a petition for certiorari in *Rice*, to determine whether the time has at last come for this Court to undertake a full review, on the merits, of the law of new criminal trial in recantation cases, which the Court until now has not done.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

Abraham Glasser
Attorney for petitioners
Joseph Alfred Tanner and
Jack Alter Pearl

Victor G. Hanson
of Counsel

February 15, 1974

APPENDICES TO PETITION FOR CERTIORARI

APPENDIX A

OPINION ("ORDER") OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604
ARGUED SEPTEMBER 14, 1973
OCTOBER 15, 1973

Before

Hon. LATHAM CASTLE, Senior Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff–Appellee,
No. 72–1950 vs.
JOSEPH ALFRED TANNER and
JACK ALTER PEARL
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois Eastern Division.
No. 67 CR 30
ABRAHAM L. MAROVITZ,
Judge.

ORDER

After a direct appeal, defendants' convictions under 18 U.S.C. §2275, setting fire to a vessel, were affirmed(1) and each was sentenced to five years in prison. *United States* v. *Tanner*, 471 F. 2d 128 (7th Cir. 1972), *cert. denied*, 409 U.S. 949 (1972).

Subsequent to the trial but prior to and also shortly after the issuance of the opinion on appeal, one of the principal

witnesses, Alvin Junior Cupp, during the period from June 27, 1971 to April 1, 1972, had telephoned John G. Broady, an investigator for the defense, on several occasions, during which conversations he recanted his trial testimony.

Cupp's prior testimony was considered in great detail in the decision on direct appeal, which summarized the effect of that testimony as follows (471 F. 2d at 132-36):

"The pivotal witness against appellants was Alvin Junior Cupp . . . .

"The Government's principal corroboration for Cupp's account was the testimony of three witnesses . . . .

". . . By far the most important part of the defense of all appellants, however, consisted of attacks on Cupp's credibility since his performance as a witness can best be described as chameleon-like. Cupp's trial testimony, which incriminated all . . . appellants, was an explicit repudiation of the account he had given at his severed trial. Furthermore, he had changed his story at least twice prior to his own trial. The circumstances surrounding these abrupt shifts were repeatedly emphasized by the defense . . . .

"Between May and July 1967 Cupp made several overtures to the defense for the purpose of recanting his grand jury testimony and accusing the Government of suborning perjury. . . . From July 1967 through March 1968 Cupp continued to accuse the Government of subornation and claimed he would not be a government witness.

"Cupp's trial was severed . . . and was held in the following May. Toward the end of 1968, Cupp recanted again, admitting to the FBI that he had committed perjury during his trial. . .

1. Defendant Tanner's conviction for conspiracy (18 U.S.C. §371) was also affirmed.

"... Whether or not Cupp perjured himself at this trial was the principal issue before the jury. By its verdict, the jury decided he had not, and we may not legally controvert that determination.

"... In the instant case appellants' charges that the Government had used money and other favors to suborn Cupp's perjury were placed before the jury in the intensive cross-examination of Cupp. The jury took them into account and held them to be inconsequential. We will not challenge that determination."

During oral argument of the direct appeal, Cupp's latest recantation was brought to the attention of this court, which suggested that since these statements had not been presented to the trial court, that court should have the first opportunity to consider the recent material (471 F.2d at 143 n.23). Consequently, the defendants filed a motion for a new trial and for a writ of error *coram nobis*.

The trial judge, who also had presided over the jury trial, denied the motion, stating:

> "This Court is satisfied that the testimony given by Cupp at the trial of these defendants, regardless of how many different conflicting stories he told in prior hearings and trials and at his own trial, as well as in private conversations with investigators and lawyers and at least one of these defendants, that he was telling the truth in the trial which resulted in the conviction of the defendants. There was significant corroboration of his testimony at that trial in several material aspects. There is nothing currently submitted to this Court by way of 'affirmations' that caused me to have any reasonable ground for believing that Cupp's testimony at the trial of the defendants was untrue . . . .
>
> * * * *

"The jury was fully aware of all of Cupp's prior contradictory statements in and out of Court as fully developed by the numerous cross-examinations of Cupp by the several lawyers representing the defendants, and they saw fit to believe his testimony in view of the corroborative evidence in several material aspects of his testimony. This Court specifically recalls it was exceptionally liberal in permitting the cross-examination by defense counsel of the witness Cupp.

We agree with the trial court. We have read the statements of what Cupp purportedly told Broady. Throughout the conversations, Cupp was primarily concerned with "selling" his latest story for $10,000. He confessed to being a "hustler" and this was obviously a somewhat desperate hustle for quick money.

In *Larrison* v. *United States*, 24 F.2d 82, 88 (7th Cir. 1928), we quoted another court in observing that "the witnesses to crimes of violence are often of a low and degraded character and . . . after they have given their testimony they are sometimes influenced by bribery and other improper considerations. . . ."

There must be an end to the Cupp story. It has been written by the jury, this court on the direct appeal and finally by the trial court on the current motion.

AFFIRMED

APPENDIX B

MEMORANDUM OPINION OF DISTRICT COURT DENYING MOTION FOR NEW TRIAL ETC.

FILED
NOV. 9 – 1972
H. STUART CUNNINGHAM
At _____ o'clock _____
CLERK

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOSEPH ALFRED TANNER,
JACK ALTER PEARL, ET AL.,
Defendants

No. 67 CR. 30

MEMORANDUM OPINION

I have read the papers filed in support of defendants' motion for a new trial and/or a writ of error *coram nobis* and for a stay of the execution of warrants.

This Court is satisfied that the testimony given by Cupp at the trial of these defendants, regardless of how many different conflicting stories he told in prior hearings and trials and at his

own trial, as well as in private conversations with investigators and lawyers and at least one of these defendants, that he was telling the truth in the trial which resulted in the conviction of the defendants. There was significant corroboration of his testimony at that trial in several material aspects. There is nothing currently submitted to this Court by way of "affirmations" that caused me to have any reasonable ground for believing that Cupp's testimony at the trial of the defendants was untrue. His current alleged recantation should come as no surprise to the defendants or their counsel.

Cupp has concededly changed his stories several times. At the cost of repetition, this Court repeats that it is completely satisfied that at the trial of the defendants in this case Cupp told the truth. Any contrary statements he has made following the trial would be unworthy of belief by this Court. In making this observation I have assumed that the statements attributed to him by the "affirmations" filed and the affidavit by Mr. Broady represents statements that Cupp actually made to Broady, even though there is no such affidavit from Cupp to that effect.

The jury was fully aware of all of Cupp's prior contradictory statements in and out of Court as fully developed by the numerous cross-examinations of Cupp by the several lawyers representing the defendants, and they saw fit to believe his testimony in view of the corroborative evidence in several material aspects of his testimony. This Court specifically recalls it was exceptionally liberal in permitting the cross-examination by defense counsel of the witness Cupp.

The Government has quoted an interesting paragraph from *People* vs. *Shilitano* 112 N. E. 733 which the Court in *Larrison* vs. *United States*, 24F 2d, Page 88 made reference to, which this Court thinks is very apropos in the instant case:

"Bearing in mind that the witnesses to crimes of violence are often of a low and degraded character and that after they have given their testimony they are sometimes influenced by bribery and other improper considerations, it is evident that the establishment of a rule which left the power to grant a new trial to a defendant to depend upon recantation by such witnesses would be subversive of the proper administration of justice. I do not wish to be understood as urging that the fact of recantation is not to be considered by the court in weighing the testimony upon which the defendant was convicted, but I wish to make clear the fact that recantation in and of itself does not necessarily require the court to order a new trial. Such being the case, whether or not a new trial should be granted must depend upon all the circumstances of the case, including the testimony of the witnesses for the people, submitted on the motion for a new trial, in which these witnesses recant the testimony which they gave upon the trial."

For the reasons above stated, the motion for a new trial, or in the alternative, for a writ of error *coram nobis* is denied and the motion for further stay of execution is also denied.

ENTER:

(Sgd) ABRAHAM LINCOLN MAROVITZ
Judge

Dated: Thursday, November 9, 1972